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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLDICK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Some of the positions and statements in brief for defendants in error perhaps require some further comment.

1. Neither the question of the right of the company to open highways across its right of way, or the right of the public to do the same, is in anywise involved in this case. We have no disposition to question the ruling in *Northern Pacific Railway*

Company v. City of Spokane, 64 Fed. 508, where it was held that the company might dedicate such highways.

Most undoubtedly the right of way of the company is subject to the police, tax and other similar powers of the states through which it passes. The public has of necessity the right to open crossings for the convenience of travel at reasonable intervals and proper places. Such right does not materially interfere with the use of the right of way for railroad purposes.

The question here is quite a different one, viz., whether the company has a right to part with, or an occupier to acquire adversely to the company by occupation, the exclusive right to a substantial portion of the right of way, which, while it cannot be shown to be at present necessary for railroad purposes, may become so in the future.

2. The statement on page 26 of the brief, that the company has made deeds of portions of its right of way upon which thousands of innocent people have expended their means in permanent improvements, is not warranted by the record. Neither is the argument that the rule we contend for would work a serious hardship to a multitude of people. There is no warrant in the record for the further statement, which the brief contains in the same connection, that thousands of permanent structures have been erected by mercantile houses upon the rights of way of railroads of the country, and that

some of these grants are in perpetuity and some long time leases.

While it may be true as is perhaps shown in the case of *Northern Pacific Railway Company v. Ely*, 25 Wash. 386, that in some few cases permanent structures have been erected upon premises, which have been conveyed by the plaintiff in error, or its predecessor the federal corporation, such cases are by no means numerous. It must be admitted that many years ago a few such conveyances were made by the officers of the federal corporation. Since counsel has seemed to step outside the record, we think it not improper to say that the practice of the plaintiff in error has been, and for the most part the practice of its predecessor the federal corporation was, not to make any deeds of its right of way, and in granting leases to insert carefully drawn provisions by which the company may terminate them at any time. Where improvements are to be erected which cannot be removed, these leases contain a provision that the company shall pay for the improvements at an arbitrated valuation.

Counsel for defendants in error correctly says: "No business concern could afford to erect such structures under a mere license," and it is quite apparent that such leases as we have described do not carry a high rental and are not to the pecuniary advantage of the plaintiff in error. As we remarked in the opening brief, its pecuniary advantage will be greatly promoted if this court decides, that it may make absolute deeds or permanent long time

leases of any part of its right of way, which its directors choose so to dispose of. Counsel for the plaintiff in error have not felt warranted in advising that such conveyances or leases are valid.

C. W. BUNN and
JAMES B. KERR,
For Plaintiff in Error.